

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

DATE FILED: May 1, 2014 1:38 PM

ORIGINAL PROCEEDING PURSUANT TO
C.R.S. § 1-40-107(2)
Appeal from the Board

IN RE TITLE AND BALLOT TITLE AND
SUBMISSION CLAUSE SET FOR
INITIATIVE 2013-2014 #103

Petitioners: MIZRAIM S. CORDERO and
SCOTT PRESTIDGE, as Registered Electors
of the State of Colorado

and

Board: SUZANNE STAERT, JASON
GELENDER, and DANIEL DOMENICO

and

Respondents: PHILLIP DOE,
BARBARA MILLS-BRIA, and SANDRA
TOLAND, Proponents.

▲ COURT USE ONLY ▲

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Case No. 14SA_____

PETITION FOR REVIEW

Mizraim S. Cordero and Scott Prestidge (“Petitioners”), registered electors of the State of Colorado, by and through their counsel, Ryley Carlock & Applewhite, respectfully petition this Court pursuant to C.R.S. § 1-40-107(2) to review the actions of the Board with respect to the title, ballot title, and submission clause set for Initiative 2013-2014 #103.

STATEMENT OF THE CASE

A. Procedural History

The Offices of Legislative Council and Legislative Legal Services conducted the Review and Comment hearing as required by C.R.S. § 1-40-105(1) on March 12, 2014. The original proponents, Phillip Doe and Barbara Mills-Bria (the “Proponents”), timely submitted a final version of Initiative 2013-2014 #103 (the “Proposed Initiative”) to the Secretary of State on March 25, 2014 for purposes of having the Title Board (the “Board”) set title. The Secretary of State or his designee is a member of the Board.

At its public meeting held April 16, 2014 (the “Initial Hearing”), the Board considered the Proposed Initiative and set a title, ballot title, and submission clause. On April 23, 2014 Petitioners timely filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1)(a). The Motion for Rehearing, together with a contemporaneous motion on the same measure filed by Douglas Kemper, was

heard at the Board's next scheduled meeting on April 25, 2014 (the "Rehearing").

The Board, after modifying the title, denied Petitioners' Motion by majority vote.

B. Jurisdiction

Petitioners submit this matter to the Colorado Supreme Court for review pursuant to C.R.S. § 1-40-107(2). Petitioners timely filed the Motion for Rehearing with the Board pursuant to C.R.S. § 1-40-107(1)(a) and timely filed this Petition for Review within seven days from the date of the Rehearing as required by C.R.S. § 1-40-107(2).

Consistent with the requirements set forth in C.R.S. § 1-40-107(2), enclosed herewith are the following: (1) the original, amended, and final versions of the Proposed Initiative filed by the Proponents; (2) the original ballot title set for this measure; (3) the Petitioners' Motion for Rehearing; (4) the Board's ruling on the Motion; and (5) Affidavit of Designated Representative Phillip Thomas Doe, Affidavit of Designated Representative Barbara Mills-Bria, Acknowledgement of Withdrawal of Designated Representative Barbara Mills-Bria, Acknowledgement of Replacement of Designated Representative Sandra Toland, and Affidavit of Designated Representative Sandra Toland .

GROUNDS FOR APPEAL

Petitioners respectfully submit that the Board erred in denying the Motion for Rehearing and therefore seek review of the final action of the Board. The following is an advisory list of issues which will be discussed fully in Petitioners' brief:

A. The Board lacked jurisdiction to set title for the Proposed Initiative where:

1. Designated representative Barbara Mills-Bria failed to appear as required by C.R.S. § 1-40-106(4)(a), which states that each designated representative of the proponents must "appear at any title board meeting at which the designated representative's ballot issue is considered." In proceeding with the Rehearing the Board violated C.R.S. § 1-40-106(4)(d), which prohibits the Board from setting title if "either designated representative of the proponents fails to appear."
2. The Board accepted as a substitute representative Sandra Toland, in violation of C.R.S. § 1-40-104, which requires proponents to designate representatives "at the time of any filing of a draft."

3. The Board accepted the notarized affidavit of Ms. Toland in violation of C.R.S. § 1-40-106(4)(b), which permits the Board to accept such an affidavit only at the first title board meeting where the representative's ballot issue is considered.

B. Pursuant to article v, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5, the Board lacked jurisdiction to set title, as the Proposed Initiative is not limited to a single subject but rather contains the following multiple and distinct objectives:

1. Establish a common property right in the “clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources”;
2. Create a constitutional public trust doctrine and impose a trusteeship upon the State;
3. Criminalize the manipulation of data, reports, or scientific information used in an attempt to utilize public trust resources for private profit; and
4. Retroactively apply the requirements of the Proposed Initiative to previously issued local, state, or federal permits thus subjecting current property interests to a taking.

C. In violation of article V, section 1 of the Colorado Constitution and C.R.S. § 1-40-106, the Board set a title and submission clause that is confusing, misleading, and not reflective of the Proponents' intent insofar as it:

1. Contains the phrase "preservation of the environment and natural resources," which is both vague and overly broad;
2. Fails to define the term "substantial impairment";
3. Fails to sufficiently inform voters that previously issued permits are subject to takings through retroactive application of the requirements contained in the Proposed Initiative; and
4. Omits in its entirety Section 6 of the Proposed Initiative.

PRAYER FOR RELIEF

Petitioners respectfully request that this Court find the Board lacked jurisdiction to set title due to designated representative Barbara Mills-Bria's failure to appear and the inclusion of multiple subjects in the title. Alternatively, Petitioners request the Court determine that the title as set is confusing, misleading, and not reflective of the Proponents' intent and therefore remand the Proposed Initiative to the Board with instructions to redraft the title to accurately and fairly represent the text of the Proposed Initiative.

Respectfully submitted this 1st day of May, 2014.

RYLEY CARLOCK & APPLEWHITE

/s/ Richard C. Kaufman

Richard C. Kaufman

Julie A. Rosen

Sarah Pallotti

Attorneys for Mizraim S. Cordero and Scott
Prestidge

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing **PETITION FOR REVIEW** was served via ICCES on this 1st day of May, 2014, as follows:

LeeAnn Morrill, Esq.
Maurice Knaizer, Esq.
Assistant Attorneys General
1525 Sherman Street, 7th Floor
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Phillip Doe
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2552 S. Macon Way
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s/ Ann Palius



DATE FILED: May 1, 2014 4:06 PM

STATE OF COLORADO



The seal of the State of Colorado, featuring a circular design with the words "THE GREAT SEAL OF THE STATE OF COLORADO" around the perimeter, a central shield with a plow, a sheaf of wheat, and a cactus, and the year "1876" at the bottom.

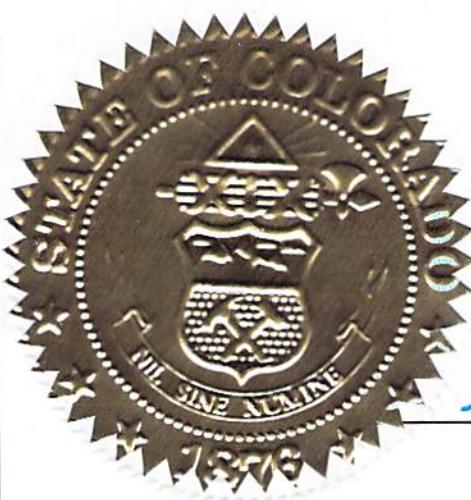
**DEPARTMENT OF
STATE**

CERTIFICATE

I, SCOTT GESSLER, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the final text, motions for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2013-2014 #103 'Public Trust Resources'".....

. IN TESTIMONY WHEREOF I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 28th day of April, 2014.



Scott Luehrs

SECRETARY OF STATE

THE SILENT STATE

BY JAMES M. COYNE

ILLUSTRATED

BY RICHARD H. DAVIS

WITH A FOREWORD BY

JOHN W. BROWN

AND A POSTSCRIPT BY

JOHN W. BROWN

WITH A PRACTICAL

APPENDIX BY

JOHN W. BROWN

AND A BIBLIOGRAPHY

BY JOHN W. BROWN

AND A INDEX

BY JOHN W. BROWN

AND A LIST OF

MEMBERSHIP



RECEIVED

MAR 25 2014

Be it Enacted by the People of the State of Colorado Colorado Secretary of State
S.WARD 9:12 A.M.

SECTION 1. In the constitution of the state of Colorado, add section 9 to article XVI as follows:

Section 9. The state's duties under the public trust doctrine to secure the rights of the people to protect natural resources. (1) THE PEOPLE OF COLORADO HAVE AN INALIENABLE RIGHT TO CLEAN AIR, CLEAN WATER, INCLUDING GROUND AND SURFACE WATER, AND THE PRESERVATION OF THE ENVIRONMENT AND NATURAL RESOURCES, REFERRED TO IN THIS SECTION AS "PUBLIC TRUST RESOURCES" ON WHICH WE ALL DEPEND AND THAT PROVIDE FOR THE HEALTH, SAFETY, AND HAPPINESS OF ALL NATURAL PERSONS, INCLUDING FUTURE GENERATIONS. PUBLIC TRUST RESOURCES ARE THE COMMON PROPERTY OF ALL THE PEOPLE, INCLUDING GENERATIONS YET TO COME. AS TRUSTEE OF THESE RESOURCES, THE STATE SHALL CONSERVE AND MAINTAIN THEM FOR THE BENEFIT OF ALL THE PEOPLE.

(2) THE STATE GOVERNMENT AND ITS AGENTS, AS TRUSTEES, SHALL PROTECT PUBLIC TRUST RESOURCES AGAINST SUBSTANTIAL IMPAIRMENT, INCLUDING POLLUTION FROM EXTERNAL SOURCES. IN SATISFYING THE STATE'S TRUST RESPONSIBILITIES, THE PRECAUTIONARY PRINCIPLE SHALL ALWAYS BE APPLIED; IF AN ACTION OR POLICY HAS A SUSPECTED RISK OF SUBSTANTIALLY IMPAIRING PUBLIC TRUST RESOURCES, IN THE ABSENCE OF SCIENTIFIC CONSENSUS THAT THE ACTION OR POLICY IS HARMFUL, THE BURDEN OF PROOF THAT IT IS NOT HARMFUL FALLS ON THOSE PROPOSING TO TAKE THE ACTION. THE STATE SHALL SEEK NATURAL RESOURCE DAMAGES FROM THOSE ENTITIES THAT CAUSE SUBSTANTIAL IMPAIRMENT OF PUBLIC TRUST RESOURCES AND USE SUCH FUNDS TO REMEDIATE THE HARM.

(3) ANY COLORADO CITIZEN, AS A BENEFICIARY OF PUBLIC TRUST RESOURCES, MAY PETITION A COURT OF COMPETENT JURISDICTION TO DEFEND AND PRESERVE SUCH RESOURCES AGAINST SUBSTANTIAL IMPAIRMENT AND TO ENSURE THAT THE STATE IS MEETING ITS OBLIGATIONS TO PRUDENTLY MANAGE SUCH RESOURCES AS A TRUSTEE. REMEDIES MAY BE GRANTED IN BOTH LAW AND EQUITY. IF A COURT FINDS THAT THE STATE HAS NOT FULFILLED ITS DUTIES AS TRUSTEE, CITIZENS ARE ENTITLED TO RECOVER ALL COSTS OF LITIGATION, INCLUDING EXPERT AND ATTORNEY FEES.

(4) THE FIDUCIARY DUTY OF THE STATE AS TRUSTEE REQUIRES IT TO USE THE BEST SCIENCE AVAILABLE IN ANY PROCESS OR PROCEEDING IN

WHICH PUBLIC TRUST RESOURCES MAY BE AFFECTED. ANY PERSON, CORPORATION, OR OTHER ENTITY FOUND TO BE MANIPULATING DATA, REPORTS, OR SCIENTIFIC INFORMATION IN AN ATTEMPT TO UTILIZE PUBLIC TRUST RESOURCES FOR PRIVATE PROFIT SHALL BE REFERRED FOR PROSECUTION FOR ANY CRIMINAL OFFENSES THAT MAY APPLY IN ADDITION TO OTHER PENALTIES THE STATE MAY IMPOSE, INCLUDING LOSS OF CHARTER TO OPERATE IN THE STATE.

(5) THIS SECTION IS SELF-ENACTING AND SELF-EXECUTING AND SHALL APPLY TO A PUBLIC ACTION OR COMMERCIAL DEALING THAT WOULD VIOLATE IT, REGARDLESS OF THE DATE OF ANY APPLICABLE LOCAL, STATE, OR FEDERAL PERMITS.

(6) LAWS MAY BE ENACTED TO ENHANCE, BUT CANNOT BE CONTRARY TO, THE PROVISIONS OF THIS SECTION.

PHILLIP T. DOE
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303 973 7774

BARBARA MILLS-BRIA
1831 S. WELCH CIR
LAKEWOOD, CO 80228
303 929 4213

Ballot Title Setting Board

Proposed Initiative 2013-2014 #103¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning a public trust in environmental resources, and, in connection therewith, defining public trust resources to include clean air, clean water, and the preservation of the environment and natural resources; requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against substantial impairment, seeking natural resource damages from anyone who substantially impairs them, and using damages obtained to remediate the impairment; allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and criminalizing the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning a public trust in environmental resources, and, in connection therewith, defining public trust resources to include clean air, clean water, and the preservation of the environment and natural resources; requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against substantial impairment, seeking natural resource damages from anyone who substantially impairs them, and using damages obtained to remediate the impairment; allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and criminalizing the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit?

Hearing April 16, 2014:

Single subject approved; staff draft amended; title set.

Hearing adjourned 4:12 p.m.

¹ Unofficially captioned "Public Trust Resources" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

RECEIVED

APR 23 2014

Colorado Secretary of State
2:45 P.M. S.WARD

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE
2013-2014 #103

MOTION FOR REHEARING

Registered electors, Mizraim S. Cordero and Scott Prestidge, through their legal counsel, Ryley Carlock & Applewhite, request a rehearing of the Title Board for Initiative 2013-2014 No. 103. As set forth below, Mr. Cordero and Mr. Prestidge respectfully object to the Title Board's setting of title and the ballot title and submission clause on the following grounds:

TITLE AND SUBMISSION CLAUSE

On April 16, 2014, the Title Board designated the title as follows:

An amendment to the Colorado constitution concerning a public trust in environmental resources, and, in connection therewith, defining public trust resources to include clean air, clean water, and the preservation of the environment and natural resources; requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against substantial impairment, seeking natural resource damages from anyone who substantially impairs them, and using damages obtained to remediate the impairment; allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and criminalizing the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit.

The Title Board set the ballot title and submission clause as follows:

Shall there be an amendment to the Colorado constitution concerning a public trust in environmental resources, and, in connection therewith, defining public trust resources to include clean air, clean water, and the preservation of the environment and natural resources; requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against substantial impairment, seeking natural resource damages from anyone who substantially impairs them, and using damages obtained to remediate the impairment; allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and criminalizing the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit?

GROUNDS FOR RECONSIDERATION

I. THE INITIATIVE IMPERMISSIBLY CONTAINS MULTIPLE SUBJECTS IN VIOLATION OF THE COLORADO CONSTITUTION AND STATUTES.

The Colorado Constitution and statutes require that each initiative that proposes an amendment to the Constitution shall contain only one subject and that subject shall be clearly expressed in the title. *See Colo. Const. art. V., § 1(5.5); C.R.S. § 1-40-106.5; In re Title, Ballot Title, Submission Clause*, 898 P.2d 1076, 1078-79 (Colo. 1995) (a proposed initiative violates the single subject rule where it “has at least two distinct and separate purposes which are not dependent upon or connected with each other.”). The Board set title for initiative No. 103 despite the fact that it contains multiple, distinct and separate purposes that are not dependent upon or connected with one another. Specifically, the initiative includes the following several, unrelated subjects:

- (1) Establishes a common property right to all “Public Trust Resources” including the “clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources” (#103, §1);
- (2) Imposes upon the State a public trusteeship to protect Public Trust Resources against substantial impairment (#103, § 2);
- (3) Creates standing for any Colorado citizen to petition the courts to defend and preserve Public Trust Resources and ensure that the State is meeting its obligations under the initiative (#103, § 3);
- (4) Establishes a criminal offense for any person, corporation, or other entity found to be manipulating data, reports or scientific information in an attempt to utilize Public Trust Resources (#103, § 4);
- (5) Creates a new preemption scheme whereby any applicable local, state, or federal permit is superseded by the initiative (#103, § 5);

These subjects are not connected or interdependent and therefore the Title Board lacks jurisdiction to set a title.

II. THE INITIATIVE'S PROVISIONS ARE SO VAGUE THE BOARD CANNOT SET A TITLE THAT ENCOMPASSES AND REFLECTS THE PURPOSE OF THE PROPOSAL.

Colorado Revised Statute §1-40-106(3)(c) requires the ballot title to accurately reflect the subject matter of an initiative to avoid confusion. The Title set for initiative 103 violates this statutory provision in the following ways:

- (1) The measure purports to establish Public Trust Resources as “the common property of all the people.” However, the measure does not clearly define the term “common property” and will lead to confusion amongst voters because the public trust doctrine has traditionally been applied to lands submerged beneath tidal and navigable waterways.
- (2) The measure purports to establish the State as trustee to protect Public Trust Resources against “substantial impairment;” however the term “substantial impairment” is undefined and so vague as to mislead voters. Paragraph two goes on to note that where an action or policy that has a “suspected risk” the burden of proof in going forward is on the proponent of the action or policy. Neither suspected risk nor a standard for the burden of proof are defined.
- (3) The initiative requires the State as trustee to “prudently manage such resources” but again fails to establish any standard upon which both the State and the people can rely upon.
- (4) The final section of the initiative is misleading and confusing to voters in that it allows laws to be enacted which “enhance” the provisions of the initiative but offers no guidance as to whether laws that are more restrictive or less restrictive fall within the purview of this measure.

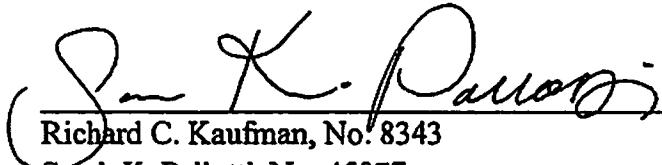
III. THE TITLE FAILS TO NOTE CRITICAL PROVISIONS OF THE MEASURE AND IS THEREFORE MISLEADING.

- (1) The title fails to note the very low standard – suspected risk – upon which the burden of proof shifts to the proponent of *any* action or policy to demonstrate there is not substantial impairment to Public Trust Resources.
- (2) The title completely omits section 5 of the initiative.
- (3) The title completely omits section 6 of the initiative.

The language of the measure is so vague that no title can correctly and fairly express the true purpose of the measure. The Title as previously approved is confusing and does not meet the requirements of §1-40-106(3)(c).

Respectfully submitted this 23rd day of April, 2014 by:

RYLEY CARLOCK & APPLEWHITE



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APR 23 2014

BEFORE THE TITLE BOARD, STATE OF COLORADO

Colorado Secretary of State
S.WARD 4:28 P.M.

MOTION FOR REHEARING

**IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE
2013-14 #103**

Petitioner, Douglas Kemper, a registered elector of the State of Colorado, by and through his counsel, Burns, Figa & Will, P.C., hereby requests a rehearing and reconsideration of the title and ballot title and submission clause (collectively the "Titles") set by the Title Board on April 16, 2014, for Initiative 2013-14 #103 (the "Initiative"), which would amend the Colorado constitution. Reconsideration is requested for the following reasons:

1. The Initiative and Titles do not conform to the single-subject requirements of Article V, Section 1(5.5) of the Colorado Constitution, and C.R.S. § 1-40-106.5.
2. The Title Board's chosen subject phrase is too broad and vague and would cause public confusion regarding the effect of a "yes/no" vote on the Initiative in violation of C.R.S. § 1-40-106.
3. The Titles fail to describe important aspects of the Initiative and are therefore misleading in violation of C.R.S. § 1-40-106.

THE INITIATIVE AND TITLES VIOLATE THE SINGLE SUBJECT REQUIREMENT

The Initiative violates the single subject requirements of Article V, Section 1(5.5) of the Colorado Constitution, and C.R.S. § 1-40-106.5, by having at least these four separate, distinct, and unrelated subjects:

1. The creation of a common property interest in specified resources, consisting of "clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources";
2. The adoption of a public trust doctrine, which would create rights of the public inherently conflicting with current water appropriation rights vested under constitutional provisions;
3. The criminalization of any manipulation of data, reports or scientific information in an attempt to use public trust resources for private profit; and

4. The retroactive application of conditions and requirements to “any applicable local, state or federal permits,” regardless of the date of such permits, subjecting current property interests to a taking.

A. Creation of a Common Property Right to Natural Resources

Section (1) of the Initiative creates an inalienable right of the people to “clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources,” which Section (1) defines as “public trust resources” and declares to be the “common property of all the people, including generations yet to come.”

Taken alone, the Initiative’s definition of public trust resources extends its reach beyond a single subject by changing the legal relationship between Colorado’s citizens and the separate and distinct resources within the definition. With particular regard to surface water in Colorado, the public has no right to waters that overlie private lands without the landowner’s consent. *See People v. Emmert*, 198 Colo. 137, 144, 597 P.2d 1025, 1030 (1979). The banks and beds of non-navigable streams in Colorado are not owned by the State of Colorado or the public at large, but by the adjoining landowners. *See id.* at 141. By creating a new common property interest in these surface waters, the Initiative completely subverts private property interests in water that are held by citizens throughout the state.

B. Adoption of a Public Trust Doctrine

Sections (1) and (2) of the Initiative impose upon the state and its agents a trusteeship over public trust resources, which are defined in Section (1) as “clean air, clean water, *including ground and surface water*, and the preservation of the environment and natural resources” (emphasis added). As trustee, the state would be required to conserve and maintain public trust resources for the benefit of all the people, as well as to protect them against “substantial impairment,” which would include “pollution from external sources.” Because of the nature of the trustee obligations the Initiative would impose upon the state with regard to the state’s surface and ground water, among other forms of natural resources, the effect of this Initiative would be to adopt a public trust doctrine in Colorado.

In its traditional common law form, public trust doctrine declares that the state holds its navigable waters and lands underneath them in trust for the people. *See Ill. Cent. RR Co. v. Illinois*, 146 U.S. 387, 452 (1892). Colorado has never adopted a public trust doctrine or applied such a doctrine to water rights within the state due to the express protection of private property rights contained in Article XVI of the Colorado constitution. *Emmert*, 597 P.2d at 1029-30 (holding Colo. Const. Art. XVI, Section 5 does not impose a public trust but protects private property rights in appropriation of Colorado waters and ownership of adjoining lands). This is likely because of the adverse impacts a public trust doctrine would have on existing water rights under the prior appropriation doctrine. *See* Gregory J. Hobbs, Jr. and Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. Colo. L. Rev. 841, 855-56 (1989). The “Colorado Doctrine” of water rights developed out of the “imperative necessity” of water

scarcity in the western region. *In re Title, Ballot Title, Submission Clause for 2011-12 No. 3*, 274 P.3d 562, 574 (Colo. 2012) (Hobbs, J., dissenting). The break from the common law was so complete in Colorado as to make “all surface water and groundwater in the state, along with the water-bearing capacity of streams and aquifers, a public resource dedicated to the establishment and exercise of water use rights created in accordance with applicable law.” See, *id.*, at 573-4.

By adopting a public trust doctrine, the Initiative would enact a constitutional provision in conflict with the prior appropriation doctrine, subrogating the rights of those who hold appropriative water rights from the state to the rights of the public to be managed restrictively by the state.¹ The Initiative would effectively dismantle water rights and water laws that have been held intact as a property rights regime based on Colorado’s constitutional, statutory, and case law for more than 150 years.

C. Creation of a New Crime

Section (4) of the Initiative requires the state, in exercising its fiduciary duty as trustee of public trust resources, to use the “best science available in any process or proceeding in which public trust resources may be affected.” The Section departs from its discussion of the state’s fiduciary duty, however, by criminalizing any act of “manipulating data, reports, or scientific information in an attempt to utilize public trust resources for private profit.”

D. Retroactive Application of Permitting Requirements

Section (5) of the Initiative provides that the newly-created process and proceeding requirements of Section (4) shall apply to any public action or commercial dealing “regardless of the date of any applicable local, state, or federal permits.” This retroactivity of the Initiative’s new requirements would threaten pre-existing private property interests in natural resources within the state if the “process or proceeding” by which a private party obtained a valid permit to use those resources were later found to violate these requirements. Such a threat to private property interests in these permits would constitute a violation of the Takings Clause of both the Fifth Amendment to the United States Constitution and Article II, Section 15 of the Colorado constitution.

¹ Previously proposed initiatives would have expressly adopted a “public trust doctrine” in the Colorado constitution provisions governing water, Art. XVI, Section 5. See *Kemper v. Hamilton*, 274 P.3d 562 (Colo. 2012); *MacRavey v. Hufford*, 917 P.2d 1277 (Colo. 1996); *MacRavey v. Hamilton (Public Rights In Water II)*, 898 P.2d 1076 (Colo. 1995); and *MacRavey v. Swingle*, 877 P.2d 321 (Colo. 1994).

THE SUBJECTS ENCOMPASSED BY THE INITIATIVE ARE SEPARATE AND DISTINCT, AND TITLES SHOULD NOT BE SET

A. The Initiative Contains Multiple Subjects That Would Cause Voter Surprise

Even where two or more facets of an initiative are related, they must not be so different as to confuse the voters, or to pass one facet surreptitiously disguised by another. Multiple subjects within an initiative set up the kind of “logrolling” that the voters intended to prevent when adopting the 1994 single-subject constitutional requirement. See *In re Title, Ballot Title, Submission Clause for 2009-10 No. 91*, 235 P.3d 1071, 1079 (Colo. 2010). A proposed initiative violates the single subject rule if its text “relate[s] to more than one subject” and has “at least two distinct and separate purposes which are not dependent upon or connected with each other.” *MacRavey v. Hamilton (Public Rights in Water II)*, 898 P.2d 1076, 1078-79 (Colo. 1995) (citing the single subject test of *People ex rel. Elder v. Sours*, 31 Colo. 369, 403 (1903), to analyze ballot initiatives). The Colorado Supreme Court held in 2007 that “[a]n initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative. We must examine sufficiently an initiative’s central theme to determine whether it contains hidden purposes under a broad theme.” *In re Title, Ballot Title and Submission Clause, for 2007-2008, #17*, 172 P.3d 871, 875 (Colo. 2007) (internal citations omitted).

Initiative 2013-2014 #103 presents this danger of voter surprise and fraud posed by disguising hidden purposes presented under a broad theme of creating a public trust in environmental resources. Imposing a public trust doctrine over the state’s air, water resources, and other natural resources is separate and distinct from creating a common property interest in such resources. Both of these subjects are completely separate and distinct from the creation of a new crime in Colorado, as well as the retroactive application of permitting requirements that would pose a threat to private property interests currently held by Coloradans. These multiple subjects are a clear example of surreptitious provisions coiled up in the folds of a complex initiative.

B. The Measure is So Vague That it is Impossible To Set A Title That Accurately Reflects the True Purpose of the Measure

The Title Board must examine an initiative’s central theme “to determine whether it contains hidden purposes or incongruous measures under a broad theme.” *Gonzalez-Estay v. Lamm (2005-06 #55)*, 138 P.3d 273, 279 (Colo. 2006). And as the Colorado Supreme Court has held that “water” was too broad a theme to satisfy the single-subject requirement, *Public Rights in Water II*, 898 P.2d 1076, 1080 (Colo. 1995), it follows that “public trust in environmental resources” is similarly too broad to encompass the multiple topics outlined above as contemplated by the single-subject requirement. The Title Board’s chosen subject phrase in the Titles, “concerning a public trust in environmental resources,” is too broad and vague to state a single subject, and would cause public confusion regarding the effect of a “yes/no” vote on the

Initiative. It fails to encompass the measure's separate and distinct provisions that would subvert private property interests in natural resources in the state, threaten Colorado citizens with criminal prosecution for a new crime, and threaten private property interests in permits through retroactive permit conditions, none of which has any necessary connection with the imposition of trustee obligations on the state and its agents.

C. The Titles Fail to Describe Important Aspects of the Measure And Are Therefore Misleading

An initiative's ballot title and submission clause must "correctly and fairly express the true intent and meaning" of the measure. COLO. REV. STAT. § 1-40-106(3)(a). "[A] material omission can create misleading titles." *Garcia v. Chavez*, 4 P.3d 1094, 1098 (Colo. 2000). Here, the Initiative's title was set as follows:

An amendment to the Colorado constitution concerning a public trust in environmental resources, and, in connection therewith, defining public trust resources to include clean air, clean water, and the preservation of the environment and natural resources; requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against substantial impairment, seeking natural resource damages from anyone who substantially impairs them, and using damages obtained to remediate the impairment; allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and criminalizing the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit.

The ballot title and submission clause were set as follows:

Shall there be an amendment to the Colorado constitution concerning a public trust in environmental resources, and, in connection therewith, defining public trust resources to include clean air, clean water, and the preservation of the environment and natural resources; requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against substantial impairment, seeking natural resource damages from anyone who substantially impairs them, and using damages obtained to remediate the impairment; allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and criminalizing the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit?

As drafted, the Titles are misleading because they fail to describe at least two important aspects of the Initiative:

- (a) The Titles improperly omit the Initiative's provision creating an inalienable right to clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources. (Init. #103, § (1)). This is a material omission of a key provision because an inalienable right to anything is, by definition, not transferable to any other person or capable of condemnation. Such a right would be held superior to other rights.
- (b) The Titles improperly omit the Initiative's retroactive application of its newly-created requirements to any previously permitted activity, including public actions and commercial transactions. (Init. #103, § (5)). This is a material omission of a key provision because any retroactively effective provision that impairs private property interests is a direct violation of the Takings Clause of both the United States Constitution and the Colorado constitution.

For these reasons, the Titles do not conform to the statutory requirements of § 1-40-106(3)(c).

WHEREFORE, Petitioner Douglas Kemper respectfully requests a rehearing and reconsideration of the title and ballot title and submission clause set by the Title Board on April 16, 2014, for Initiative 2013-14 #103.

Respectfully submitted this 23rd day of April, 2014.

BURNS, FIGA & WILL, P.C.

By:

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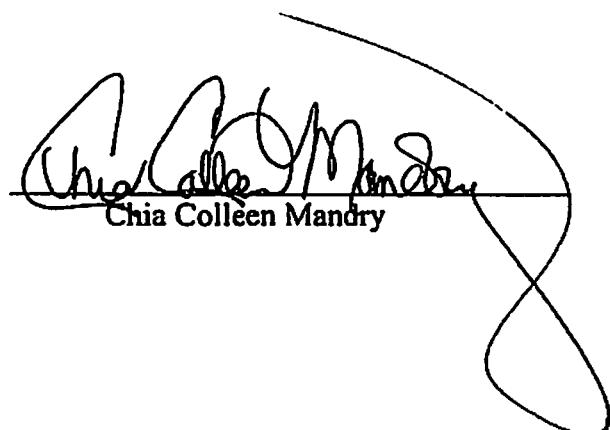
Attorneys for Petitioner
Douglas Kemper

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing MOTION FOR REHEARING was served via U.S. mail on this 23rd day of April, 2014, as follows:

Phillip Doe
7140 South Depew Street
Littleton, CO 80128

Barbera Mills-Bria
1831 South Welch Circle
Lakewood, CO 80228



A handwritten signature in black ink, appearing to read "Chia Colleen Mandry". The signature is fluid and cursive, with a horizontal line underneath it. To the right of the signature is a large, stylized, open circle.

Ballot Title Setting Board

Proposed Initiative 2013-2014 #103¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning public ownership of natural and environmental resources, and, in connection therewith, creating a public trust in those resources, which include clean air, clean water, and the preservation of the environment and natural resources; requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against any substantial impairment, regardless of any prior federal, state, or local approval; seeking natural resource damages from anyone who substantially impairs them, and using damages obtained to remediate the impairment; allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and criminalizing the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning public ownership of natural and environmental resources, and, in connection therewith, creating a public trust in those resources, which include clean air, clean water, and the preservation of the environment and natural resources; requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against any substantial impairment, regardless of any prior federal, state, or local approval; seeking natural resource damages from anyone who substantially impairs them, and using damages obtained to remediate the impairment; allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and criminalizing the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit?

Hearing April 16, 2014:

Single subject approved; staff draft amended; title set.

Hearing adjourned 4:12 p.m.

¹ Unofficially captioned "Public Trust Resources" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

Hearing April 25, 2014:

Motion for Rehearing denied except to the extent that the Board made changes to the titles.

Hearing adjourned 10:57 a.m.